

AL-ZUHAIRI (Migration) [2018] AATA 3239 (6 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Sundus Chasib Idan AL-ZUHAIRI
VISA APPLICANT:	Mr Qusay Gherib SEYAH
CASE NUMBER:	1705496
DIBP REFERENCE(S):	OSF2015/038605
MEMBER:	Russell Matheson
DATE:	6 July 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 06 July 2018 at 11:45am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Whether the parties are in a genuine spousal relationship – Evidence of financial aspects limited by circumstance – Joint household during periods of cohabitation – Relationship held out to others – Relationship viewed as continuous and ongoing – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211, 309.212, 309.213, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 March 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (applicant) applied for the visa on 10 March 2015 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevant to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the visa applicant is the spouse of the sponsor.
4. The review applicant (sponsor) appeared before the Tribunal on 26 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant in person. The Tribunal also received evidence from the sponsors mother Nooream Ghanem Salman and the applicant's sister Nadira Sabah.
5. The review applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. Background

8. The applicant and sponsor state that they were introduced to each other by the applicant's sister and a friend, who both live in Australia. They claim to have first spoken to each other via telephone on 7 April 2013. The parties met in person on 25 September 2013 in Germany, where they had a religious marriage ceremony a few days later, as well as a wedding ceremony. They spent a month together during this time.
9. The parties lodged an application for a partner visa at the end of January 2014. The application was refused in June of the same year on the basis that they had not provided any evidence of being legally married to each other and was found not to meet the criteria for a partner migration visa on the grounds of being in a de facto relationship.
10. The sponsor travelled to Norway on 19 November 2014 and the parties subsequently married legally in Norway on 19 December 2014 and registered their marriage on 22 December 2014. The sponsor returned to Australia on 19 February 2015 after living with the applicant for approximately three months.
11. On 29 August 2017 the applicant arrived in Australia on a visitor visa and lived with the sponsor until 22 November 2017.
12. The applicant has previously been married and there are two children of that relationship who reside in Norway. The applicant and sponsor have one child (Sar), born on 21 October

2015, of their relationship who lives with his mother in Australia. The sponsor has also been previously married and was divorced in 2013. There are no children of the relationship.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the visa applicant is the spouse of the sponsor as defined in s.5F of the Act
14. The Tribunal has before it the Department of Immigration's (the Department) file relating to the visa applicant; its own file; and a copy of the Department's decision provided by the sponsor (review applicant) to the Tribunal.
15. The evidence the parties and witnesses provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spousal or de facto relationship

16. Subclause 309.211(2) and cl. 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered in Bergen, Norway on 22 December 2014. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
19. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
20. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor, the applicant and two witnesses to be detailed, consistent and credible.

21. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the explanations offered are plausible.

22. **Are the other requirements for a spousal relationship met?**

23. ***Financial aspects***

24. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.

25. The sponsor in order to support her claims that the applicant provided financial support to her and their son provided documentary evidence of having money transferred from the applicant in Norway into her Westpac bank account in Australia. The sponsor provided bank statements indicating numerous deposits for the period from June 2014 to May 2018. The Tribunal accepts that the applicant has supported the sponsor financially. The Tribunal places some weight to the evidence.

26. The parties stated that they have opened an account with Westpac in May 2018. The parties stated that they are both receiving financial support from their respective governments in Australia and Norway by way of social security payments. The parties stated that they have no financial assets. The parties stated that they share the day-to-day living expenses when they are physically together.

27. There is no evidence before the Tribunal the parties' joint account is utilised for pooling their financial resources, the parties do not have any joint liabilities or major assets such as real estate together. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other.

28. The Tribunal accepts there is a degree of difficulty of establishing and sharing financial resources when the sponsor and the applicant live in separate countries. The Tribunal places little weight on this aspect of the relationship.

29. ***Nature of the household***

30. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.

31. The parties state to have spent one month together in Germany in 2013 and three months together in Norway in November 2014 to February 2015. The parties provided limited details in regard to their living arrangements when they both visited Germany in 2013. They told the Tribunal that after their religious marriage ceremony in Germany they lived together at the applicant's cousin's unit as husband and wife. The parties state that they lived as husband and wife at the applicants rented unit after their civil marriage ceremony in Norway during the sponsor's three month visit in November 2014 to February 2015, living in a spousal relationship. The applicant travelled to Australia in August 2017 and lived with the sponsor as husband and wife for another period of three months. The applicant is currently residing at the sponsor's residence at Heckenberg with their son.

32. The Tribunal has considered the nature of the household. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries.
33. The parties provided broadly consistent and detailed oral evidence of their activities and living arrangements when together in Germany, Norway and more recently in Australia. Based on the evidence presented by the parties, the Tribunal accepts that they live together and have established a joint household when physically together overseas and in Australia. The Tribunal places some weight on this aspect of the relationship.

34. Social aspects

35. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
36. The applicant and his sponsor provided the following evidence regarding social aspects of their relationship:
- photos from their religious and formal wedding ceremonies
 - other photos showing the parties in several different settings
 - 2 statutory declarations by third parties from Australia
37. The applicant and sponsor state to have had a proxy engagement ceremony at the sponsor's home in Australia in September 2013, which was attended by both of their families and some friends. No evidence of this ceremony has been provided.
38. The parties subsequently had a Sabian Mandaean religious marriage ceremony in Germany in September 2013 and a reception a few days after. Based on the photos submitted, both events were attended by a number of people and the Tribunal has considered this positively and places some weight upon the photographs. The parties then had their formal wedding ceremony in Norway in December 2014. From the photos provided, it appears that this event was held without any guests.
39. Based on the parties' claims, the parties were initially introduced to each other by the applicant's sister and a friend. Although the parties provided oral evidence there was no other corroborating evidence submitted in support of this claim.
40. Two statutory declarations have been provided in support of the parties' claims for an ongoing spousal relationship, one by the applicant's sister and the other by the sponsor's brother with the visa application. Both declarations have identical contents and were made on the same day, 8 December 2016. Neither declarant has witnessed the relationship in person. The parties provided an additional eight statutory declarations to the Tribunal all from family members and they also have identical contents al made on 26 May 2018. The Tribunal placed little overall weight on the declarations.
41. The sponsor has provided several letters of support from her treating doctor(s) and social services, which assist her. Based on the letters of support, the sponsor appears to have declared her relationship to the applicant and the Tribunal has given this some weight.
42. In addition to the photos described above, the parties have provided several photos showing them alone with each other on a number of occasions and one photo of them with a group of other people. They have also provided photographic evidence together with family and

friends in Australia and attending playgroup with their son. The Tribunal has given some weight to these photographs.

43. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

44. Commitment

45. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
46. The parties claim to have been introduced to each other by the applicant's sister in Australia in April 2013 and remained in contact via telephone and their relationship developed over the ensuing months. They first met in September 2013 in Germany where a religious marriage ceremony was performed and they lived as husband and wife for a month. The sponsor travelled to Norway in November 2014 where the parties held a civil marriage ceremony and lived together for three months. The applicant travelled to Australia in August 2017 and lived with the sponsor as husband and wife for another period of three months. The applicant is currently residing at the sponsor's residence at Heckenberg, New South Wales. The parties have a child born on 21 October 2015 to their relationship. The parties stated that during times of separation they remained in regular contact by telephone, skype and viber.
47. The sponsor applicant told the tribunal that she needs the applicant to be with her to help with the raising and education of their child who is currently being treated by a speech therapist for delayed speech. The sponsor told the Tribunal that the applicant helps her with the care and support for their son and arranging doctor's appointments. The applicant told the tribunal that his priority is his wife and child in Australia and he was focused on the education of his son. The parties told the Tribunal that they wished to expand their family and have more children.
48. The applicant told the Tribunal that he wanted to be gainfully employed in Australia and is a qualified jeweller. He further stated that he had made enquiries in relation to employment opportunities in Australia. The applicant told the Tribunal that he would undertake an English language course in Australia. The parties told the Tribunal that the applicant had passed his Norwegian language course in Norway.
49. The Tribunal accepts that the parties have a commitment to each other and to the care and support of their common child. The parties presented oral evidence of continued daily contact during periods of separation and a sound knowledge of each other's family, living arrangements, health, employment, studies and personal history.
50. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations.
51. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other as plausible, persuasive and genuine.
52. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship.

53. Having regard to the entirety of the circumstances, the Tribunal is satisfied the visa applicant and the sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing and they do not live separately and apart on a permanent basis.

54. Findings

55. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
56. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
57. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18. Therefore the applicant meets cl.309.212 and cl.309.213.
58. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

59. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).